Supreme Court, U.S.
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No. ——

In The

Supreme Court of the United States

October Term, 1996

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

Was Defendant Rapanos properly invoking the Fourth Amendment warrant requirement when he refused to allow employees of the Michigan Department of Natural Resources to enter and inspect property undergoing development where the state employees intended to conduct a wetland determination of the property?

Can the Government, suspecting the violation of an environmental regulation, ignore locked gates or fences and enter onto property to conduct unrestricted and unlimited data and sample gathering without a search warrant?

LIST OF PARTIES

United States of America, Respondent

John A. Rapanos, Petitioner

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Order of the United States Court of Appeals for the Sixth Circuit of August 4, 1997 Denying Defendant Rapanos' Petition for Rehearing with Suggestion that case be heard en banc, Sixth Circuit File No. 95-2169. (App. p. 30)

Memorandum, Opinion and Order, August 3, 1995, *United States of America v. John A. Rapanos,* United States District Court Eastern District of Michigan Southern Division, 93-CR-20023-DT, *United States v. Rapanos,* 895 F. Supp. 165 (E.D. Mich., 1995) (App. p. 31)

Opinion and Order denying Plaintiff's Motion for Reconsideration, September 20, 1995, *United States of America v. John A. Rapanos,* United States District Court Eastern District Court of Michigan Southern Division, Case No. 93-CR-20023-DT, Record Entry No. 202 (App. p. 42)

CONCISE STATEMENT OF BASIS FOR JURISDICTION.

(i) The Opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was decided and filed May 28, 1997.

(ii) The Order of the United States Court of Appeals for the Sixth Circuit denying

Defendant Rapanos' Petition for Rehearing with suggestion that the case be heard en banc was filed August 4, 1997.

(iii) This matter does not involve a cross-petition for a writ of certiorari.

(iv) 28 U.S.C. § 1254(1) provides that cases in the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon the petition for any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONCISE STATEMENT OF THE CASE

On August 22, 1989, five Department of Natural Resource officials "knowledgeable in plants and soils" (App. pp. 24-45) met the Petitioner John Rapanos at the boundary of his property and requested entry for the purpose of making a wetlands determination. Rapanos refused to allow the DNR officials onto the property without a search warrant. Rapanos was unaware of the

meeting until he was told at the last minute to meet some DNR people. (App. p. 62)

The only access to the Salzburg property was through a locked gate (App. p. 61). DNR employee Harrington testified to the presence of a highway right-of-way fence around the perimeter of the property. (App. p. 47) With US10 to the north and M47 to the east, both limited access of expressways, those sides of the property were fenced. Aerial photographs demonstrate that the Salzburg parcel is landlocked by limited access highways and surrounding parcels, except for the southern tip of the parcel touching on Salzburg Road, and one side of a 40 acre parcel extending to Flajole Road to the west. (App. p. 65)

By December of 1988, the land had been cleared, bulldozed, and a large hedgerow, up to ten feet high, running the entire length of the property, consisting of cleared trees, brush and dirt had been created. (App. pp. 60, 61)

The Government argued that over $300,000 had been spent by Rapanos in developing the property, and that the land had been cleared to create a shopping mall. (App. p. 64)

MDNR employee Hal Harrington testified that when he met with Rapanos on the Salzburg site on August 22, 1989, "I asked him if we could get on-site to do a **wetlands evaluation**, and he said, no, you cannot get on site,. . . . " (App. p. 46) (emphasis added) Harrington testified that "we had people there that were knowledgeable in plants and soils." (App. p. 46) Harrington also testified that he met Rapanos on site again on August 30, 1989, and again asked Rapanos if the DNR could get on

the site "to do a wetlands evaluation." (App. p. 46) Steve Spencer of the DNR testified "we had intended on doing a **wetland determination** at the time of the meeting." (App. p. 48) Peg Bostwick from the DNR testified that Rapanos was "unwilling to accept any **delineation** or mapping of wetland boundaries on the property by our staff." (App. p. 56, 57) (emphasis added)

There are three components of wetlands recognized in the Corps of Engineers Wetland Delineation Manual: hydric soils, hydrophytic vegetation and hydrology. (App. p. 58). To test for hydric soil, the color and characteristics of the soil under the "A" horizon, which is under the surface, is examined. (App. pp. 50-53) To test for hydrology, the water level in soil pits is gauged, and the soil saturation under the surface is measured. (App. p. 55)

After Rapanos refused to consent to a Government's search on August 22, 1989, the government obtained a search warrant and entered the Salzburg property on November 9, 1989, seizing 35 soil samples (App. p. 18) and 53 plant specimens. (App. p. 59)

In the first trial, which ended in a mistrial, the Government's first witness testified concerning Rapanos' refusal to consent to search. Upon defense objection, the district court requested briefs on the issue, and ruled that the testimony was admissible. (App. p. 6)

In the second trial, the Government engaged in cross-examination of the Defendant concerning his refusal to consent to search on August 22, 1989, whether the Defendant was practicing concealment by his refusal to consent

to search, and why he did not disregard his attorney's advice not to consent to search. (App. pp. 34, 35)

The Defendant was convicted of filling wetlands. The district court granted Defendant a new trial holding that the Government's cross-examination of the Defendant concerning his refusal to consent to the MDNR's entry as plain error. (App. pp. 31-41)

The district judge concluded, after viewing the entirety of the trial, that a reasonable jury could have rendered either verdict. The district judge noted that at one point the jury returned a note indicating they were deadlocked, and concluded that the unchecked prejudicial comments may indeed have tipped the scales in favor of conviction. (App. 41)

The Sixth Circuit Court of Appeals, one Judge dissenting, found that the property in issue should be considered open fields. (App. pp. 1-29) The Sixth Circuit's opinion held that fact that the property was surrounded by a fence, or that entry onto land could only be made through a locked gate, or that the land had undergone extensive alteration and development for one economic purpose or another and was "commercial property" has no bearing on whether the property is open fields. (App. p. 14) Circuit Judge Nelson, in his dissenting opinion, noted:

> Mr. Rapanos and his lawyer undoubtedly understood that the work which the DNR expected to perform on the Salzburg Road property would entail the collection of a significant quantity of physical evidence. (App. p. 25)

* * *

It was not just a cursory inspection for which consent was being withheld. (There had been many such inspections already, of course.) Rapanos and his lawyer must have known that the DNR officials wanted physical evidence – the taking of soil samples had been discussed as early as March 16, it will be recalled, in the presence of Lawyer Allen – and Rapanos and Allen were insisting that the officials get a search warrant before entering the property. (App. p. 26)

Judge Nelson's dissenting opinion goes on to state:

The open fields doctrine does not give the Government *carte blanche* to mine evidence from beneath the surface of the fields. Yet here the Jury heard extensive testimony about the taking of soil borings, and the jury could fairly have inferred that this was one of the things to which Mr. Rapanos and his lawyer were unwilling to agree. I have no doubt that Judge Zatkoff drew such an inference. (App. p. 27)

ARGUMENT

I. ENTRY ONTO PREMISES FOR REGULATORY INSPECTIONS CANNOT BE RESOLVED BY THE "OPEN FIELDS" DOCTRINE.

A. REFUSAL OF ENTRY ONTO PROPERTY FOR A REGULATORY INSPECTION IS PROTECTED UNDER THE FOURTH AMENDMENT

Case law extending Fourth Amendment protection to commercial property and stripping open fields of Fourth Amendment protection has developed separately and in different contexts.

By applying the "open fields" analysis of *Oliver v. United States,* 466 U.S. 170; 104 S.Ct. 1735; 80 L.Ed.2d 214 (1984) to a regulatory inspection the Sixth Circuit's opinion virtually eliminates the warrant requirement for regulatory searches outside of enclosed structures, and would allow government regulators to climb the eight foot fences noted in *Dow Chemical Company v. United States,* 476 U.S. 227; 106 S.Ct. 1819; 90 L.Ed.2d 226 (1986) and enter the premises to conduct warrantless regulatory inspections.

Dow Chemical dealt with the question of aerial photography of a commercial site without physical entry. The *Dow Chemical* opinion stated that "any physical entry by EPA into any enclosed area would raise significantly different questions. . . . " 476 U.S. at p. 237; 106 S.Ct. at p. 1826. The present case is the *Dow Chemical* case with physical entry.

Physical entry in *Dow Chemical* would have been "significantly different" from the entry approved in *Oliver v. United States, supra,* because of two factual distinctions: the commercial nature of the *Dow Chemical* property and the refusal by *Dow Chemical* officials to allow entry. *Dow Chemical v. United States,* 476 U.S. at p. 229; 106 S.Ct. at p. 1822. The government officials in both *Oliver* and *Dow Chemical* were faced with fenced enclosures and "no trespassing" signs. The subjective expectation of privacy was the same in both cases. In *Marshall v. Barlow's, Inc.,* 436 U.S. 307; 98 S.Ct. 1816; 56 L.Ed. 305 (1978) "the critical fact" was that "entry over Mr. Barlow's objection is being sought by a Government agent." 436 U.S. at 314, 98 S.Ct. at 1821. The lack of consent to a regulatory inspection has constitutional significance.

Although the *Dow Chemical* opinion is framed in terms of the open fields doctrine, in *Florida v. Riley,* 488 U.S. 445; 101 S.Ct. 693; 102 L.Ed.2d 835 (1989), identical aerial surveillance of the curtilage of a house was held permissible. Thus, the open fields doctrine was not essential to the *Dow Chemical Company* decision, and the significant difference that physical entry would have made in that case is due to the property owner's refusal to consent to a regulatory inspection of a commercial premises.

The case cited as the origin of the open fields doctrine, *Hester v. United States,* 265 U.S. 57; 44 S.Ct. 445; 68 L.Ed. 898 (1924) cites **4 Blackstone's Commentaries** 223, 225, 226, as its only authority to exempting open fields from the Fourth Amendment. (265 U.S. at 59; 44 S.Ct. at 446) However, the Blackstone cite is helpful only for Fourth Amendment purposes in defining the extent of the curtilage of a house, which would include areas into

which burglary would be "attended with the same circumstances of midnight terror." **4 Blackstone's Commentaries,** 225. The "midnight terror" of common law house burglary has no application to commercial property although the Fourth Amendment clearly applies to such properties. The *Hester* open fields concept, based on an abandoned jug of moonshine lying in an unoccupied and undeveloped field, can not be applied so as to strip all "out-of-doors" commercial property of Fourth Amendment protection.

The opinion of the Sixth Circuit below conflicts with the decision of the Seventh Circuit in *United States v. Swart,* 679 F.2d 698 (CA 7, 1982) In *Swart,* the Seventh Circuit concluded that where an employee of the business denied entry to police officers, the officers "had no reason to believe there was a general invitation to enter the premises," (*Idem,* at p. 702) although the business was open and the vehicles inspected were in an area generally open to the public.

The Court in *Swart* observed that a search in an open field would not necessarily be legal since, under *Katz v. United States,* 389 U.S. 347; 88 S.Ct. 507; 19 L.Ed.2d 576 (1976), the location of a search does not provide a "talismanic solution to every Fourth Amendment problem." 389 U.S. at 351, n.9, 88 S.Ct. at 511, n.9. This Court in *Dow Chemical v. United States,* 476 U.S. at 239; 106 S.Ct. at 1827, n.7 observed that its holding did not reach the issues raised in *Swart,* noting that *Swart* "involved actual physical entry."

Thus, although "what is observable by the public is observable without a warrant by the Government inspector as well" *Marshall v. Barlow's, Inc.*, 436 U.S. at 315; 98 S.Ct. at 1822, "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States*, 389 U.S. at 351; 88 S.Ct. at 511. When the land owner has excluded the public, as both Dow Chemical and John Rapanos had done, what the government wanted to see was not "observable by the public" and equally not accessible to the government without a warrant.

B. PROPERTY UNDERGOING DEVELOPMENT IS NOT AN "UNOCCUPIED OR UNDEVELOPED" OPEN FIELD UNDER *OLIVER*.

The open fields doctrine of *Oliver* applies to "open and *unoccupied*" fields (466 U.S. at 179, 104 S.Ct. at 1742, fn. 10) (emphasis added) or "*unoccupied* or *undeveloped* areas" (*Idem*, 466 U.S. at 180, 104 S.Ct. at 1742, fn. 11) (emphasis added), see also *United States v. Dunn*, 480 U.S. 294, 304; 107 S.Ct. 1134, 1141; 94 L.Ed.2d 325 (1987). In *Oliver* although the police were initially hailed by an occupant, when the police identified themselves the occupant vanished. In *Dow Chemical* there was extensive commercial development within the fences. Rapanos' Salzburg parcel was neither unoccupied, since the occupant, Rapanos, told the state officials to leave, nor undeveloped, since it was the areas of disturbance that the MDNR wanted to inspect.

The exclusion in *Oliver* of open fields from the Fourth Amendment based on a literal reading of the language of

the Amendment, and the inclusion in *Dow Chemical* within the Fourth Amendment of enclosed commercial property, has been referred to as an "enigma." *United States v. VanDamme*, 48 F.3d 461, 465 (CA 9, 1995). To harmonize with the *Katz v. United States, supra*, formulation of "reasonable expectation of privacy," the *Oliver* language of "unoccupied" or "undeveloped" fields indicates that the owner of property that has become commercial due to development, and is occupied by the developer, has a reasonable expectation of privacy.

C. TRESPASS ONTO OCCUPIED PROPERTY REMAINS A FACTOR IN FOURTH AMENDMENT ANALYSIS

Katz v. United States, supra, held that the "trespass" doctrine of *Olmstead v. United States*, 277 U.S. 438; 48 S.Ct. 564, 72 L.Ed. 944 (1928) was no longer controlling. While *Olmstead* noted that a conversation obtained by wiretap involved "no entry of homes or offices," the opinion is founded principally on the determination that the Fourth Amendment addresses only searches of "material things" 277 U.S. at 464; 48 S.Ct. at 568. *Katz* changed this formulation by holding that the Fourth Amendment is not based on "constitutionally protected areas" or "right to privacy" (trespass law), 389 U.S. at 350; 88 S.Ct. at 510, but on the invasion of the "privacy upon which he justifiably relied," stating:

> But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. 384 U.S. at 351; 88 S.Ct. at p. 511.

Katz did *not* hold that trespass or physical intrusion would no longer be indicative of a search, but rather that an invasion of a reasonable expectation of privacy could constitute a search even in the absence of a trespass or intrusion.

Although the *Oliver* opinion states that the common law of trespass has "no relevance" to the application of the Fourth Amendment (466 U.S. at p. 184, 104 S.Ct. at p. 1744), this Court in *Soldal v. Cook County*, 506 U.S. 56; 113 S.Ct. 538; 121 L.Ed.2d 450 (1992) noted that "property rights . . . were afforded Fourth Amendment protection." 506 U.S. at 63-64; 113 S.Ct. at 544. Although *Soldal* notes that under *Oliver* the Fourth Amendment "does not protect possessory interests in all kinds of property" 506 U.S. at 62; 113 S.Ct. at 549, fn. 7, *Soldal* clearly indicates that trespass does have constitutional significance. *See also, Horton v. California*, 496 U.S. 128, 136-137; 110 S.Ct. 2301, 2307-2308; 110 L.Ed.2d 112 (1990). The occupant of commercial property has a reasonable expectation, recognized by society and the Court, to exclude government inspectors from trespassing on the premises without a search warrant, *Marshall v. Barlow's, Inc., supra*, even when the property is out-of-doors. *Donovan v. Dewey*, 462 U.S. 514; 101 S.Ct. 2534; 69 L.Ed.2d 269 (1981).

II. REGULATORY INSPECTIONS WITHOUT CONSENT ARE SUBJECT TO THE WARRANT REQUIREMENT

Administrative entry without consent on a commercial premises can only be properly effected through the warrant procedure. *See v. City of Seattle*, 387 U.S. 541; 87

S.Ct. 1737; 19 L.Ed.2d 943 (1967). "The business man . . . has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Idem*, 387 U.S. p. 543, 98 S.Ct. p. 1739. A proprietor of a commercial premises has the right to conduct business free from unreasonable official intrusion. *GM Leasing Corp. v. United States*, 429 U.S. 338, 353; 98 S.Ct. 619, 629; 50 L.Ed.2d 530 (1977).

Warrantless searches of commercial premises are generally unreasonable. *Marshall v. Barlow's, Inc.*, 436 U.S. at 312; 98 S.Ct. at 1820 (administrative searches by OSHA for safety hazards in the work area). The Fourth Amendment has its roots in the offensiveness of the general warrant, which was " . . . acutely felt by the merchants and businessmen whose premises and products were inspected" *Idem, United States v. Chadwick*, 433 U.S. 1, 7-8; 97 S.Ct. 2476, 2481; 53 L.Ed.2d 538 (1977). An owner of a business has an expectation of privacy in commercial property which society is prepared to consider to be reasonable, even in the context of administrative inspections designed to enforce regulatory statutes. *New York v. Burger*, 482 U.S. 691, 699; 107 S.Ct. 2636, 2642, 96 L.Ed.2d 601 (1987).

The Fourth Amendment is applicable to regulatory inspections of commercial premises, even if those premises are out of doors. *Donovan v. Dewey*, 452 U.S. 594; 101 S.Ct. 2534; 69 L.Ed.2d 269 (1981) (surface stone quarry).

Warrantless inspections of commercial premises may be constitutionally objectionable if their occurrence is so random or unpredictable that the owner has no real expectation that the premises will be inspected. *Idem*, 452

U.S. at 599, 101 S.Ct. at 2538. Where no legislative rules have been established governing the procedures the inspectors must follow, a warrant may be necessary to protect the owner from the unbridled discretion of the officers. *Marshall v. Barlow's Inc.*, 436 U.S. at 323, 98 S.Ct. at 1826. Without a warrant, the occupant has no way of knowing the lawful limits of the inspector's power to search. *Camara v. Municipal Court, supra*, 387 U.S. 523, 532; 87 S.Ct. 1727, 1732; 18 L.Ed.2d 930 (1967).

The search contemplated by the five-member MDNR team to conduct a "wetland determination" and "mapping" is subject to the same warrant requirement. If government inspectors may constitutionally remain on out-of-doors property even after being told they are trespassing, there is no restriction on the length, extent or intrusiveness of the inspection in the absence of a search warrant.

The Sixth Circuit's holding that a visual inspection during a warrantless entry onto open fields does not constitute a unreasonable search for Fourth Amendment purposes conflicts with this Court's holdings that a regulatory inspection by visual observation is subject to the Fourth Amendment warrant requirement. *Camara v. Municipal Courts, supra* (inspection for housing code violations) *See v. City of Seattle, supra* (fire code inspection), and *Marshall v. Barlow's, Inc., supra* (inspection by OSHA for safety hazards).

III. THE EXERTION OF DOMINION AND CONTROL OVER A PREMISES FOR INSPECTION IS A SEIZURE.

The decision by governmental authorities to exert dominion and control over the property for their own purposes constitutes a "seizure." *United States v. Van-Leeuwen*, 397 U.S. 249; 90 S.Ct. 1029; 25 L.Ed.2d 282 (1970), *United States v. Jacobsen*, 466 U.S. 109, 120; 104 S.Ct. 1652, 1669; 80 L.Ed.2d 85 (1984). A meaningful interference with an individual's possessory interest in property is a seizure. *Idem*, 466 U.S. at 113, 104 S.Ct. at 1656. A warrantless *de minimis* infringement of a possessory interest can be constitutionally reasonable. *United States v. Jacobsen, supra*, 466 U.S. at 125-126; 104 S.Ct. at 1162-1163. *Cardwell v. Lewis*, 417 U.S. 583, 591-592; 94 S.Ct. 2464, 2469-2470; 41 L.Ed.2d 325 (1974). The extent of the warrantless intrusion will determine whether it is "reasonable" for Fourth Amendment purposes. *United States v. Place*, 462 U.S. 696; 103 S.Ct. 2637; 77 L.Ed.2d 110 (1983). A request by the government to allow five officials "knowledgeable in plants and soils" to enter onto enclosed land to perform a wetland determination is an exercise of dominion and control over that property. Their proposed entry for this purpose is a seizure subject to the Fourth Amendment.

IV. THE SEIZURE ACTIVITY ANTICIPATED BY THE MDNR IS NOT ALLOWED UNDER THE OPEN FIELDS DOCTRINE

While permitting warrantless entry and "observation" in "open fields," the decisions of *Oliver v. United States, supra,* and *United States v. Dunn,* 480 U.S. 294; 107 S.Ct. 1134; 94 L.Ed.2d 325 (1987), do not permit the seizure activity contemplated by the MDNR. *Oliver* and *Dunn* were limited to "police observations . . . while standing in the open fields." (408 U.S. p. 303-305, 107 S.Ct. p. 1142). Neither *Oliver* nor *Dunn* allow the greater intrusion of a warrantless seizure.

The conducting of tests on a premises without either a warrant or the occupant's consent is an unreasonable search within the meaning of the Fourth Amendment. *Camara v. Municipal Court, supra.* The Fifth Circuit has recognized "a reasonable expectation of privacy in *the land under* an open field." *Husband v. Bryan,* 946 F.2d 27, 29 (CA 5, 1991) (emphasis added).

Dow Chemical v. United States, supra, upheld the ruling of *See v. City of Seattle, supra* while approving mere visual observation through aerial photography without a warrant. An intrusive entry involving tests of soil and water and the seizure of soil and plant samples requires the prior authorization of a search warrant.

Moving a stereo in plain view to locate the serial number constituted a "search." *Arizona v. Hicks,* 480 U.S. 321; 107 S.Ct. 1149; 94 L.Ed.2d 347 (1987). *Arizona v. Hicks* rejected the invitation "to seek a new creature" that is neither a "cursory inspection" nor a "full-blown search." *Idem,* 480 U.S. at 328; 107 S.Ct. at 1154. The taking of soil

boring samples, the analysis of soil colors and textures and saturation, and the measuring of water levels in soil pits, which are necessary components of a wetland determination are far beyond a "cursory inspection," and therefore are sufficiently intrusive to constitute a "search", implicating the full protections of the Fourth Amendment.

The open fields doctrine is limited in scope to sights seen in the open field. *Air Pollution Variance Board of Colorado v. Western Alfalfa Corporation,* 416 U.S. 861, 865; 94 S.Ct. 2114, 40 L.Ed.2d 607 (1974) (neither the inspector nor the public had been excluded from the area where the observations took place). The warrantless physical intrusion, manipulation and dismantling of beehives located in open fields is not sanctioned by the visual inspection allowable under the open fields doctrine. *Allinder v. State of Ohio,* 808 F.2d 1180, 1186 (CA 6, 1987).

It was within the trial judge's discretion to infer from the evidence that the DNR intended to probe the soil if allowed entry on August 22, 1989. The trial judge is vested with the authority to "take into account the knowledge he gained from presiding at the trial, knowledge that the appellate court will not have." 2 Charles A. Wright, *Federal Practice and Procedure,* Sec. 559, at 369 (footnote omitted).

As noted in Judge Nelson's dissenting opinion below, there was a sufficient basis for the district judge to infer the DNR's intent to conduct an extensive wetland "determination," including probing the soil. Upon this allowable inference, the trial court's ruling that Defendant Rapanos had a Fourth Amendment right to refuse entry

to the DNR was not an application of an erroneous legal standard.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari, should be granted.

Respectfully submitted,

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